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547-926—74——1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1062

EDMUND ROSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is being filed with the Court because recent developments suggest that the principal government witness committed perjury at the trial of this case as to collateral matters raised by the defense in an effort to impeach his credibility.

BACKGROUND

The indictment, returned on July 5, 1972, charged petitioner and two co-defendants, Nicholas DeStefano and Nicholas Lamatina, with obstruction of justice and other crimes. This indictment grew out of an undercover investigation that had been initiated by the federal government in March 1971 with the aid of Detective Robert Leuci of the New York City Police Department. Detective Leuci agreed to hold himself

out as a corrupt policeman to anyone seeking such services. Specific transactions giving rise to this indictment took place between October 4, 1971, and October 19, 1971, and are summarized at pages 6–10 of our brief in opposition to the petition for a writ of certiorari.

At the trial, the principal government evidence consisted of the testimony of Detective Leuci and tape recordings of some but not all of his meetings with the alleged conspirators, all of whom, except petitioner Rosner, pleaded guilty. On cross-examination Leuci admitted the commission of certain criminal acts but denied the commission of others. Leuci has never been convicted of any criminal offense, and the crimes he has admitted, whether at trial or since, have no relationship whatsoever to the facts surrounding the guilt or innocence of the petitioner.

On December 5, 1972, the jury found petitioner guilty of obstruction of justice, three counts of bribery, and conspiracy. On January 12, 1973, petitioner filed a motion for a new trial based upon newly discovered evidence of additional past criminal acts by Leuci. This motion was denied on January 26, 1973, and the denial was not appealed. On February 5, 1973, petitioner filed a second motion for a new trial on the ground of newly discovered evidence, consisting of allegations that the government had obtained information from petitioner's co-defendants, DeStefano and Lamatina, who had pled guilty, which impaired Fifth and Sixth Amendment rights of petitioner. That motion was denied on March 15, 1973.

The conviction and the denial of the second new trial motion were appealed. The court of appeals

affirmed on September 26, 1973, and a petition for a writ of certiorari was thereafter filed. The petition raised three questions relating to (1) whether or not petitioner was entrapped, (2) whether or not petitioner's Fifth and Sixth Amendment rights were violated by information obtained from the co-defendants, and (3) whether the trial court should have given petitioner's counsel access to an internal police file containing complaints against Leuci. On March 19, 1974, while the petition for a writ of certiorari was pending in this Court, petitioner filed a third motion for a new trial in the district court, based upon allegations of newly discovered evidence of other past criminal acts by Leuci and charging the government with prior knowledge of that evidence. A hearing on that motion has not yet been held.[1]

The brief for the United States in opposition to the petition was filed on April 18, 1974. At that time, no one in the office of the Solicitor General or the Criminal Division of the Department of Justice was aware that Detective Leuci, on the night of April 17–18, 1974, had admitted to officials in the United States Attorney's Office for the Southern District of New York that he had participated in criminal activities beyond those he had admitted during his testimony in this case. This development was called to the attention of the office of the Solicitor General by the office of the United States Attorney for the Southern

[1] Under Rule 33, Fed. R. Crim. P., the District Court can grant no relief until the return of the mandate from the court of appeals.

District of New York on April 30, 1974. Further inquiry into the matter led to the letter from the Solicitor General to the Clerk of this Court on May 7, 1974, requesting that consideration by the Court of the petition be postponed pending the filing of further memoranda by the parties.

Discussion

Because these admissions of additional criminal acts by Leuci contradict his trial testimony denying such acts, this Court is presented with the question of how these disclosures bear on the proper disposition of the petition for a writ of certiorari now before it. As we see the situation, there are three analytically distinct questions before the Court:

First, if the Court is otherwise inclined to grant the petition for a writ of certiorari, should it do so and proceed to consider on the merits the issues it presents, before the questions raised by this newly discovered evidence are resolved?

Second, should this Court, in the first instance, itself undertake to determine whether or not the new admissions by Leuci require that a new trial be granted, or should such a determination be made initially by the district court in connection with the pending new trial motion?

Third, if the Court decides that it is the district court that should first determine whether or not a new trial is required and, further, that the issues raised in the petition for certiorari do not warrant review, should it simply deny the petition, or should it grant the petition for the limited purpose of remanding the case to the district court for a hearing on the motion for a new trial?

1. With respect to the first of the foregoing questions, it remains the view of the United States that, as we argued in our original memorandum, the issues raised by the petition for a writ of certiorari were correctly decided by the court of appeals and do not merit review by this Court. We believe that the new admissions by Detective Leuci have no relevance to the issues raised in the petition and thus do not enhance the suitability of those issues for review by this Court. Two of the issues presented by the petition involve no legal question touching upon Leuci's veracity; the only issue that is arguably relevant to these new admissions by Detective Leuci is the third: whether or not the trial judge properly ruled, after an *in camera* inspection, that Leuci's complaint file should not be provided to the defense. But the correctness of that ruling, made on the record then before the court, cannot turn upon facts subsequently discovered.

Quite apart from these considerations, we understand *Mesarosh* v. *United States,* 352 U.S. 1, to indicate that this Court will not ordinarily proceed to consider on the merits the questions raised by a petition under these circumstances. In that case, all Justices agreed that the Court should not reach the issues presented in the petition "until this cloud [possible perjury by a government witness] upon the integrity of the convictions had been dissolved." 352 U.S. at 20. Although there may be circumstances in which the importance of the issues for any new trial would cause this Court to consider them, we do not believe this is such a case.

2. It is the view of the United States that this Court should not itself undertake to determine whether a new trial is required as a result of the newly discovered evidence. We are advised by counsel for petitioner that he intends to argue that this procedure is required by *Mesarosh*. But we believe *Mesarosh* to be inapposite.

In *Mesarosh*, following the grant of certiorari and shortly prior to oral argument, the Solicitor General disclosed that evidence available to him gave the government reason to believe that a key prosecution witness had repeatedly perjured himself in other proceedings in which he had given testimony similar to that given at trial in the case then before the Court—testimony that went directly to the merits of the charges. The government moved to remand the case to the district court for a hearing on whether a a new trial should be granted. Instead, this Court ordered a new trial.

Mesarosh differs from this case in several important respects. First, and most important, the discovery that the witness had systematically fabricated testimony of the type involved in the case dealt a devastating blow to his credibility.[2] Thus, this Court could reasonably have concluded—and we think did conclude—that the key finding necessary to support an order granting a new trial—that a different outcome on retrial was

[2] This case would be analogous to *Mesarosh*, accordingly, if it were found that Leuci had repeatedly made false accusations of bribery and obstruction of justice against other persons in other proceedings. There is no suggestion that anything of this sort has occurred.

likely—was inevitable. Thus, any court would, in light of the disclosure, have had to grant the motion for a new trial. This Court said as much: "[I]f on a remand the District Court should rule that the verdict against some of the petitioners could stand, we would be obliged, on a subsequent appeal, to reverse and, at that late date, direct that a new trial be granted." 352 U.S. at 12–13.

No such aura of inevitability surrounds the outcome of petitioner's new trial motion.

While we do not consider it either feasible or appropriate at this time and on this record to argue in full the factual and legal issues that must be considered in connection with any decisions whether a new trial should be ordered in this case, even a brief summary of the facts reveals the complexity of that inquiry and the uncertainty of its outcome.

The critical evidence against petitioner concerned the course of dealings at numerous meetings between Leuci, DeStefano, Lammatina and petitioner. Leuci was the only prosecution witness to attend these meetings. Although many of the meetings were recorded, others were not, and Leuci and petitioner differed as to some of what took place at the unrecorded meetings. The prosecution's view of the evidence was that petitioner was a willing participant in the corrupt scheme, the defense's view that he was a coerced victim. In order to further its theory of the case, the defense endeavored to demonstrate that Leuci was motivated to "make" a case against petitioner in order to avoid prosecution for his own corrupt acts. "The defense

theory was, and is, that the government had agreed not to prosecute Leuci for relatively recent and serious crimes in exchange for Leuci's undertaking to make cases against corrupt (or corruptible) participants in the criminal justice system." (Brief in Support of Defendant's Third Motion for New Trial, March 19, 1974, p. 8.) This attack began with a defense investigation of Leuci before trial, the subpoena of the police disciplinary file in order to pursue further leads, the extensive cross-examination of Leuci, and two post-conviction motions for new trial—one decided adversely to petitioner but not appealed (filed January 12, 1973); the other pending in the district court (filed March 19, 1974).

Before and during trial, Leuci admitted his participation in three different schemes to shake down potential criminal narcotics suspects in exchange for an assurance from Leuci or other policemen that potential investigations against them would not be pursued. These activities were developed in detail on cross-examination, and Leuci admitted receiving sums up to $10,000 in these instances (Tr. 345–367). He conceded that these actions were criminal (*e.g.*, Tr. 348–349, 351), and he testified that he did not expect to be prosecuted for his "criminal activities" (Tr. 396). Although these crimes might not have been as "fresh" as the defense would have liked, the admissions made it clear that Leuci had, himself, committed crimes as serious as those charged against petitioner. While additional admissions of criminal acts would have been cumulative material further impeaching

the trustworthiness of the witness, it is settled law that the discovery of new evidence of an impeaching or cumulative nature is not a ground for a new trial. *E.g., United States* v. *Pfingst,* 490 F. 2d 262 (C.A. 2); *United States* v. *Marquez,* 363 F.Supp. 802 (S.D. N.Y.), affirmed, 490 F.2d 1383 (C.A. 2); *United States* v. *Kahn,* 472 F.2d 272, 287 (C.A. 2), certiorari *E.g., United States* v. *Pfingst,* 490 F.2d 262 (C.A. 2); denied, 411 U.S. 982; *United States* v. *DeSapio,* 456 F. 2d 644, 657 (C.A. 2); *United States* v. *Capaldo,* 276 F. Supp. 986, 987–988 (D. Conn.), affirmed, 402 F.2d 821 (C.A. 2), certiorari denied, 394 U.S. 989; *United States* v. *Fassoulis,* 203 F. Supp. 114, 117 (S.D. N.Y.); *United States* v. *Boisen,* 181 F. Supp. 349, 351 (S.D. N.Y.).

In deciding a motion for a new trial, a court would have to determine whether, in light of the fact that at trial Leuci did admit to the commission of serious crimes, the fact that many important conversations were tape recorded, the fact that petitioner admitted the criminal acts underlying the conviction, and the fact that petitioner, in his testimony, attributed much of his "entrapment" to DeStefano and Lamatina (Tr. 842, 866–868), who were not government agents but are convicted and sentenced co-conspirators, these new admissions of additional criminal acts and possible perjury by Leuci warrant grant of the motion for a new trial.

We submit that these are determinations that should properly be made by the trial judge, who presided at the trial and is fully familiar with the facts of this case. It should be made only after hearing such new

evidence as is available, including evidence bearing on petitioner's allegation, which the United States Attorney denies, and which is potentially critical to the disposition of the new trial motion, that there was knowledge on the part of or wrongdoing by the prosecutors in connection with false testimony by Leuci.[3] Should the district court, after hearing the pertinent evidence, deny the motion for a new trial, its ruling would, of course, be appealable, ultimately to this Court.

If, despite the foregoing arguments, the Court determines to follow the *Mesarosh* procedure and itself pass initially on the new trial question, the Solicitor General would like the opportunity to submit an additional memorandum setting out at greater length the content of Leuci's new admissions and their bearing on the original trial in thise case, and arguing more fully the merits of the new trial issue. We have not done so at this time for two reasons:

First, as set forth in the May 5, 1974 affidavit of Paul Jay Curran, United States Attorney for the Southern District of New York, submitted in an action brought by the Special State Prosecutor for the State of New York to obtain access to Leuci, 74 Civil 1912, S.D. N.Y.,[4] these newly admitted offenses by Detective Leuci are now the subject of ongoing investigations by Assistant United States Attorneys and by

[3] The absence of knowledge by the prosecution of Leuci's other criminal activities would render them inadmissible for impeachment purposes, since they would not have given Leuci an incentive to testify favorably to the government if the government was unaware of them.

[4] A copy of this affidavit is being lodged with the Court.

agents of the Drug Enforcement Administration and the Internal Revenue Service. Some evidence relating to these offenses has already been presented to a federal grand jury. During this period, it is critical that the information provided by Detective Leuci remain confidential because of the possible impact of public disclosure of that information on the pending investigations, which are not limited to potential criminal acts by Leuci alone.

Second, one of the theories available to petitioner on his motion for a new trial is that the long, complex relationship between Detective Leuci, the United States Attorney's Office, and the prosecution of this case constitutes or entails prosecutorial misconduct. Thus, petitioner's brief in support of a motion for a new trial filed in the district court on March 19, 1974, alleged that "the government has been engaged in a deliberate and massive suppression of evidence, within its files, corroborating Leuci's deep and continuous involvement in illegal drug transactions betweeen 1968 and 1972." (Brief, p. 1.) A preliminary review of the transcript of this trial, the new trial motion papers of the defense, and the memoranda and affidavits of the government in response to those motions, conducted in the office of the Solicitor General, reveals no prosecutorial misconduct. However, our initial review of the evidence also persuades us that it is not feasible for the Office of the Solicitor General to conduct the kind of comprehensive factual inquiry and make the kind of evidentiary determinations that would be required to present this Court with a satisfactory sum-

mary of all relevant evidence bearing on the issue of whether a new trial should be granted.

3. The remaining question is whether, if the Court agrees with us that the new trial issue should be first considered by the district court and that the questions presented in the certiorari petition do not merit further review, the petition for a writ of certiorari should be denied or the petition granted and the case remanded to the district court for the purpose of proceeding with the new trial motion. While we have no objection to the latter course of action (the new trial issue will be fully litigated and petitioner's claims considered on the merits in either event), considerations of judicial economy may favor the former course. There is no reason to leave open the question of the suitability of the issues presented by the pending petition for review by this Court if the Court is able to determine at this time that they do not warrant review. The problems of taint that concerned the Court in *Mesarosh,* where certiorari had been granted and the Court was about to review the case on the merits, would not apply to a mere declination to review non-certworthy issues by means of a denial of certiorari that in no way prejudices the petitioner's right to full consideration by the courts of other, potentially meritorious claims.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

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